7-12-1976

Leroy Winstead and Margie Ann Winstead v. Department for Human Resources Commonwealth of Kentucky

Appellee's Brief 1976-SC-0446

APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 76-446

LEROY WINSTEAD and
MARGIE ANN WINSTEAD — APPELLANTS

V.

DEPARTMENT FOR HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY, et al. — APPELLEES

APPEAL FROM HOPKINS CIRCUIT COURT
Honorable Thomas B. Spain, Trial Judge

BRIEF FOR APPELLEE

This is to certify that copies of this Brief for Appellee have been served on The Honorable Jerry W. Nall, Suite 12-16, Odd Fellows Bldg., Owensboro, Kentucky 42301, Attorney for Appellants; The Honorable Leland Monhollon, 111 S. Main St., Madisonville, Kentucky 42431, Guardian ad Litem; and The Honorable Thomas B. Spain, Judge, Hopkins Circuit Court, Madisonville, Kentucky 42431, Trial Judge, this 12th day of July, 1976, pursuant to RCA 1.250.

LYNN T. MITCHELL, Attorney for Appellees

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STATEMENT OF THE QUESTION PRESENTED

WAS THE JUDGMENT OF THE HOPKINS CIRCUIT COURT, DATED JANUARY 13, 1976, DISMISSING APPELLANTS PETITION FOR ADOPTION CORRECT?

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BRIEF FOR APPELLEES

MAY IT PLEASE THE COURT:

For the purpose of this brief, the Appellants, Leroy Winstead and Margie Ann Winstead, will be referred to as the Winsteads or the Appellants; the Department for Human Resources, Commonwealth of Kentucky, will be referred to as the Department or the Appellee.

COUNTERSTATEMENT OF THE CASE

A. Statement of the Nature of the Proceeding

The Appellants filed a petition to adopt the child known as Stephanie Melinda Klein on October 6, 1975. (T.R., p.1) The Department for Human Resources, a party to the action and Appellee herein,

filed a motion to dismiss the petition on October 14, 1975. (T.R., p. 8) The motion was argued orally before The Honorable Thomas B. Spain, Judge, Hopkins Circuit Court, on December 22, 1975. (T.E., p. 1-25) On January 13, 1976, an order dismissing the petition for adoption was entered in the Hopkins Circuit Court. (T.R., p. 13,14) This is the judgment appealed from.

B. Statement of the Facts

In stating the facts of the case, the Department would insist that, for the purpose of this appeal, the only pertinent facts are as follows:

1. The child in question, Stephanie Melinda Klein, was removed from the home of the Appellants on September 4, 1975, and was not returned to their home. The adoption petition was filed on October 6, 1975, a time when the child was not present in their home.

2. The Appellants have never filed a written application with the Department for Human Resources to receive the child, Stephanie Melinda Klein, and have never been given such permission. (T.R., p. 8, 9; T.E., p. 7,8, 16-18, 23-25)

3. The child in question was in the custody of the Department for Human Resources.

The Department would point out that facts alleged by the Appellants in their brief were never introduced into evidence or in any way proved as the case was decided on the law. Needless to say, a great number of such allegations are denied by the Department. We would allude to only two of the allegations of the Appellants. (1) The Appellants refer to the fact that the foster home agreement between the Appellants and the Department was forged as to Mr. Winstead's signature. If the Appellants are going to make such accusations, we think they should also include the fact that the forgery was done by Mrs. Winstead, and that Mr. and Mrs. Winstead freely accepted funds in payment on the contract.

(2) The Appellants, in their brief, indicate that the child in question was born out-of-wedlock and there was no necessity for terminating parental rights of the father. Counsel for Appellants may not be aware that, since the case of Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, a case in which the court gave certain rights to natural fathers of children born out-of-wedlock, the Department has felt it necessary as a matter of policy to terminate rights of natural fathers of children born out-of-wedlock.

ARGUMENT

THE JUDGMENT OF THE HOPKINS CIRCUIT COURT, DATED January 13, 1976, DISMISSING THE PETITION FOR ADOPTION WAS CORRECT.

At first blush it might appear difficult to argue against all of the allegations made by the Appellants, none of which have been proved by evidence introduced in court. However, when the case is analyzed as a whole, we see that we need only apply ourselves to the questions of law upon which the trial court relied in dismissing the petition.

Although the Appellants call the argument that the Appellants had not made application for permission to receive the child idiotic, the same argument having been accepted by the trial court below, we would point out that the idea was originally brought out by the Court of Appeals of Kentucky in the case of Department of Child Welfare v. Jarboe, Ky., 464 S.W. 2d 287 (1971), when the Court ruled:

> This most sensitive field of the law dealing with the care and placement of children in adoptive homes is one that is peculiarly within the jurisdiction of the legislature. It is a field of law that is susceptible to public policy. It is the

legislature that reflects this policy. KRS 199.470(4) provides:

> "(4) No petition for adoption shall be filed unless prior to the filing of the petition the child sought to be adopted has been placed for adoption by a licensed child-placing institution or agency or by the department, or the child has been placed with written approval of the commissioner; but no such approval shall be necessary in the case of:
>
> (a) A child sought to be adopted by a stepparent, grandparent, sister, brother, aunt or uncle;
>
> (6) A child received by the proposed adopting parent or parents from an agency without this state with the written consent of the commissioner." (Emphasis added).

It will be noted that the above act requires that before the child can be adopted it must have been placed in the home for the purpose of adoption. It is therefore abundantly clear that the legislative policy of this state is that no child except as set out in subsections (a) and (b) of the above statute is to be adopted unless it is first placed in the home for that purpose by the Department of Child Welfare.

Had the Department made a motion to dismiss Mr. and Mrs. Jarboes' complaint it is our opinion the trial court would have had no alternative but to dismiss the action. Bedinger v. Graybill's Executor & Trustee, Ky., 302 S.W. 2d 954 (1957). There is considerable doubt that the Department could validly waive this statutory requirement.

In fact, in his brief, counsel for the Appellants has misinterpreted the whole case of Jarboe, supra. We reemphasize that, in that case, the court held that had a motion to dismiss been filed, it should have been granted. The court only agreed to decide the issue on the merits and to decide the question of whether or not the Department was arbitrary since the case had been decided on that basis in the court below. Appellee would point out that the case of Department of Child Welfare v. Jarboe, supra, is very much in point with the instant case except that the instant case may be stronger for the Department in that, in the Jarboe case, the child sought to be adopted was in the home of the petitioners. In the instant case, such was not true.

KRS 199.470(3) provides:

> (3) No petition for the adoption of any child under the age of sixteen (16) shall be filed until after the child has lived continuously in the home of the petitioner for at least three (3) months immediately prior to the filing of the petition unless the child has been placed for adoption by the department or an agency licensed to place children for adoption by the department. In the case of a child placed for adoption by the department or an agency licensed by the department, the petition may be filed at the time of placement.

In referring to the above statute in his brief, counsel for Appellants failed to include the very important words "immediately prior to the filing of the petition." (Brief for Appellants, p. 7) The trial court found that this wording meant that the child must be living in the home of the petitioners at the time of the filing of the petition. (T.E., p. 24, T.R., p. 13) In any event, the child in question had not been in the home of the petitioners for a period of approximately thirty-two (32) days prior to the filing of the petition. (T.E., p. 24, T.R., p. 13) Certainly this child was not in the home of the petitioners immediately before the filing of the adoption petition, and therefore would not come within the provisions of KRS 199.470(3).

The Department would point out to the Court one other statute, KRS 199.473(5), which provides:

> Nothing in this statute shall be construed to limit the authority of the department or a licensed child-placing insitution or agency to determine the proper disposition of a child committed to it by the juvenile court or the circuit court, prior to the filing of an application to place or receive.

This statute again points up the requirement that persons wishing to adopt a child file a written application to receive the child.

As to KRS 199.470(3), we think the reason for this statute is clear. It is reasonable that a child should be residing in the home of its adopting parents immediately before being adopted. (If a child should happen to be in the hospital, it

doubtless would still be considered a resident of the home of its parents or adoptive parents.) This statute prevents would-be adoptive parents from deciding that they desire to adopt just any child to whom they may take a fancy.

KRS 199.470(4) and 199.473 set out a detailed system by which persons may apply to have children placed in their home for the purpose of adoption. The court, in Jarboe, supra, has decided that this system applies to children committed to the Department for Human Resources. The system contains guidelines for original decisions with provisions for appellate review.

The Appellants seem to be attacking the constitutionality of the adoption statutes. We would point out that the statute, KRS 199.470(4) and the predecessor statute to KRS 199.473 were held constitutional in the case of Department of Child Welfare v. Lorenz, Ky., 407 S.W. 2d 699 (1966). In that case, part of the basis of the court's holding the statutes constitutional was that the Department does not have unbridled authority in that the statute provides for appeal to the courts. The Appellants have not seen fit to take advantage of this procedure by filing a written application for permission to receive the child as required by the statute.

In reviewing the total case, it appears clear that the adoption statutes were not complied with by the Appellants; therefore, the court had no jurisdiction to accept the adoption petition.

CONCLUSION

For the reasons stated above, we urge the Court to affirm the decision of the trial court below.

Respectfully submitted,

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